No. 11,911

IN THE

United States Court of Appeals

For the Ninth Circuit

CATHERINE O'CONNOR,	
	Appellant,
vs.	
UNITED STATES OF AMERICA,	
	Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR THE UNITED STATES.

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OPINION BELOW.

The court rendered no opinion.

JURISDICTION.

The appellant, Catherine O'Connor, was indicted on July 9, 1947, in the District Court for the Northern District of California, Southern Division, as follows:

Count One—for wilfully and knowingly attempting to evade and defeat her personal income taxes in the amount of $1,103.46, for the calendar year 1942, in violation of Section 145(b), Internal Revenue Code;

Count Two—for wilfully and knowingly attempting to evade and defeat $6,630.90 of her personal income and Victory taxes for the calendar year 1943, in violation of Section 145(b), Internal Revenue Code;

Count Three—for wilfully and knowingly attempting to evade and defeat $8,967.48 of her personal income taxes for the calendar year 1944, in violation of Section 145(b), Internal Revenue Code. (R. 1-5.)

Motion for bill of particulars and motion to dismiss indictment were denied on September 22, 1947, and the defendant entered a plea of not guilty to each count of the indictment. (R. 33-34.) Trial was had in the District Court and on April 6, 1948, jury returned a verdict finding appellant guilty on the first count of the indictment and stated they were unable to agree on the second and third counts of the indictment. (R. 35.) On April 21, 1948, the District Court committed appellant to the custody of the Attorney General for imprisonment for a period of six months and to pay a fine in the sum of $5,000.00 on the first count of the indictment. (R. 38-41.) Notice of Appeal was filed on April 22, 1948. (R. 42-43.)

STATEMENT OF QUESTIONS INVOLVED.

1. Did any prejudice occur by reason of the Court having denied appellant's request for a bill of particulars containing greater detail than that furnished by the Government?

The Government contends that no prejudice occurred, and further, even if it be considered that the denial of further particulars was in the first instance erroneous, appellant was not taken by surprise in any particular or prejudiced in any matter at a second trial of the same issues, at which the same witnesses were called.

2. Is the evidence sufficient to support the verdict?

The Government contends that the evidence is more than ample to support the verdict.

3. Did prejudicial errors occur during the trial?

The Government contends that no prejudicial errors occurred, and that appellant was given a fair trial.

4. Did prejudicial error occur in the instructions given by the Court to the jury, or in the rejection of any of appellant's proposed instructions?

The Government contends that the instructions were full and complete, fairly and clearly stated the the law with reference to the issues, and that no prejudice resulted from the denial of any of appellant's proposed instructions.

STATUTES INVOLVED.

Title 26, Internal Revenue Code:

SEC. 145. PENALTIES.

*   *   *   *   *   *   *

(b) Any person required under this title to collect, account for, and pay over any tax im-

posed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

STATEMENT.

Appellant has not seen fit to make a statement of the evidence, except as appears incidentally in the course of the argument in her brief. Moreover, such statements of evidence as do appear are incomplete, fragmentary, and in many instances either contrary to the record or entirely unsupported by it. For this reason, it is deemed proper to make a statement of the evidence for the assistance of this Honorable Court.

The appellant, Catherine O'Connor, who is occasionally referred to in the testimony by the names of Catherine Larson and Catherine Jost (names of previous husbands), was engaged in the tavern or bar business in the city of San Francisco, California, during the entire period covered by the indictment. From January 1, 1942, until July 15, 1942, the business was operated as a copartnership with one Victor Divers,

each partner having an equal interest. (R. 120-122.)[1] As of July 15, 1942, Divers sold his one-half interest in the business to appellant for $1,600.00. (Ex. 13; R. 123, 124.) During the course of the partnership a gray bound ledger was maintained, purporting to show the daily receipts and disbursements of the partnership business. (Ex. 14; R. 124, 125.) Entries were made in this book by each partner. (R. 126.) At the time the partnership was severed this record was left on the business premises. (R. 125.) Appellant, as sole proprietor of the business, continued to enter the daily receipts of the business in this book to and including August 23, 1942. (Ex. 14; R. 156-182; 205-217.)

In the course of a routine examination of appellant's income tax returns for the years 1942, 1943 and 1944 by a deputy collector, made as a result of an anonymous letter (R. 84), appellant was asked to produce the records of her business. She then produced a ledger or daybook (Ex. 5), containing entries purporting to show receipts and disbursements of the business for the period July 16, 1942, to December 31, 1944, and stated that the entries in it were made by herself. (R. 87.) This book was supplied to the accountant who prepared her returns, and was his sole source of information as to receipts and disbursements

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[1]Page numbers of the Transcript of Record as used herein are those set forth on official Transcript of Record certified to by the Clerk of the District Court, and appear in the transcript by the use of a numbering machine. It is noted, however, that appellant has used court reporter's numbers so that the numbers used by appellant are approximately 79 page numbers away from the official number.

for the period July 16, 1942, to December 31, 1944 (R. 280-282), with the exception of certain rentals received by appellant in 1944 (R. 282, 283). The accountant relied upon Exhibit 5 as correctly setting forth the receipts of the tavern business. (R. 283.)

Although appellant denied under oath the entries of receipts made in the "gray book" (Ex. 14) for the period July 16, 1942, to August 23, 1942, were in her handwriting, she admitted that certain of the disbursements listed during that period were in her handwriting and others in the handwriting of her then husband, William Jost. (R. 141-145; Ex. 15.) An attempt had been made to obliterate the figures in the receipts column of the "gray book" for the period July 16 to August 23, 1942, by ink and pencil scrawlings. (Ex. 14; R. 147.) Similar obliterations were observed on check stubs of the appellant by the examining agent. (R. 148.) These check stubs were returned to the appellant on July 8, 1946, and her receipt therefor obtained. (R. 149; Ex. 16.) They were not produced during the trial.

Two competent and qualified examiners of questioned documents, E. O. Heinrich (R. 91-205), and Postal Inspector James E. Conway (R. 205-220), pronounced the figures of receipts in the "gray book" (Ex. 14) for the period July 16 to August 23, 1942, as being definitely in appellant's handwriting. The receipts figures in the "gray book" averaged in excess of $17.00 per day more than the daily receipts figures in Exhibit 5. (R. 384-385.)

Unable to rely upon receipts figures in Exhibit 5, the Government agents analyzed appellant's income by three methods. These were (1) application of funds (R. 385-390); (2) annual increases in net worth (R. 390); (3) applying average daily understatement of $17.00 per day to the entire period after appellant acquired full title to the business. (R. 391.) Each of these methods produced comparable figures:

Net income per return filed	Net income method #1	Net income method #2	Net income method #3
$ 777.29 (Ex. 2)	$ 3,788.52 (Ex. 28)	$ 5,176.39 (Ex. 31)	$ 3,837.29 (R. 391)
7,879.28 (Ex. 3)	17,612.82 (Ex. 29)	13,536.86 (Ex. 31)	13,999.28 (R. 391)
5,091.98 (Ex. 4)	11,110.42 (Ex. 30)	10,688.33 (Ex. 31)	11,211.98 (R. 391)
13,748.55	$32,511.76	$29,401.58	$29,048.55

During the period in question the appellant purchased and completely paid for an apartment house at a cost of $17,000.00, an amount in excess of her total reported income, without regard to other assets acquired and necessary living expenses. (Ex. 31.)

Appellant called to the stand Special Agent Paul Tormey, who testified that he had made an audit of her income for the years 1942, 1943 and 1944. His testimony was that he had found the correct income as compared to the returns filed, as follows (R. 710, 711):

Year	Per Return	Per Audit
1942	$ 777.29	$ 4,840.73
1943	7,879.28	19,472.00
1944	5,091.98	22,552.30

Tormey reconciled the higher income figures of his audit with those of Krause, by stating that the differ-

ence arose from Krause having allowed appellant every item of deduction which she had claimed either in her returns or in her testimony at the previous trial, whether or not the items could be substantiated or were ordinarily allowable. (R. 711-712.) Special Agent Clarence Krause stated that his instructions were "to lean over backwards . . . on any items whatsoever where there would be any doubt at all about it, anything Mrs. O'Connor claimed, give her the benefit of the doubt and allow it, which is exactly what was done in this case." (R. 508.)

In addition to daily receipts, false entries were made by appellant in Exhibit 5 with reference to charitable donations. In each of the years a number of items purporting to be donations to the Red Cross, Salvation Army, and other charities were included on the books and a substantial part thereof claimed as deductions on the returns. (R. 368-370.) After attempted verification, appellant was questioned under oath on November 1, 1943, at which time she stated that such payments were to police officers. (R. 470-1, Ex. 33.) Subsequently, she claimed that such payments were in fact to cover gambling losses (R. 371), and so testified at the trial (R. 896-7).

ARGUMENT.

I.

THE APPELLANT WAS NOT PREJUDICED BY REFUSAL OF COURT TO GRANT FURTHER PARTICULARS.

On July 31, 1947, appellant filed a Demand for Bill of Particulars. (R. 6-9.) On the same date, the Government filed on answer, furnishing certain of the matters requested, but stating as to others that appellant was in possession of ascertaining such facts. (R. 10-14.) Thereafter, on August 26, 1947, appellant filed a document entitled Motion for Bill of Particulars or In the Alternative To Make Indictment More Certain, supported by certain affidavits. (R. 15-26.) Thereafter, the Court denied the latter motions. (R. 31.)

Appellant now apparently complains that the ruling of the Court was prejudicial to the preparation of her case to the extent that she was taken by surprise by the testimony regarding accounting computations by the Government at the trial, and further by her inability to make exhaustive examinations of the work-sheets of the accountant at times when the Court was not in session. (Op. Br. 25-51.)

It is well settled that the granting or denial of a bill of particulars is in the sound discretion of the trial court, and if no abuse or prejudice appears its action in denying the application will not be disturbed on appeal. *Wong Tai v. United States,* 273 U.S. 77, 82, 47 S. Ct. 300, 71 L. Ed. 545; *Robinson v. United States,* 9 Cir., 33 F. 2d 238, 240; *Maxfield v. United*

States, 9 Cir., 152 F. 2d 593, 596, cert. den., 327 U.S. 794, 66 S. Ct. 821, 90 L. Ed. 1021.

In the case of *Maxfield v. United States, supra,* this Court states:

> . . . The indictments clearly informed appellants of the annual amount of income on account of which taxes were allegedly evaded; and the figures given were intelligibly broken down. Appellants had their records in their own possession and were in position to analyze the general allegations of the bill. There was no showing or appearance of surprise, nor was any continuance requested while the trial was in progress.

The situation in the instant case is exactly analogous. The indictment (R. 1-5) clearly sets forth the source of appellant's income, and the nature of her deductions. It states the amounts of tax sought to be evaded. Appellant had her records in her own possession since July 8, 1946, when they were returned by the agents and a receipt given by appellant therefor (Ex. 16), with the exception of the "gray book" Exhibit 14, which was made available to appellant at all times (R. 27-28), a fact not denied by appellant's counsel (R. 30), until introduced in evidence at the first trial. Thereafter it remained in the custody of the District Court Clerk, until introduced in evidence at the second trial.

If any surprise could have existed on the part of appellant with respect to the evidence of the Government, it was dissipated by the fact of a first trial involving the same issues and the same witnesses,

with the exception of two handwriting experts called by the Government. Indeed, the only surprise apparently claimed by appellant is the fact that the Government caused a new audit to be made between the first and second trial for the purpose of resolving every conceivable doubt in favor of appellant. (R. 508, 711-12, 419.)

Appellant further complains that the refusal for further particulars resulted in prejudice to her case in that demands to see work-sheets of the witness Krause were not acceded to. However, on direct examination, this witness did not testify directly from such sheets, but from schedules prepared from appellant's books and records, and schedules agreed upon with appellant and her counsel, all of which were placed in evidence. (Exhs. 23, 24, 25, 26, R. 357-419.) Counsel for appellant minutely cross-examined Krause on the items going to make up his audit. (R. 450-485.) While the witness was on the stand, he offered the detailed schedules to counsel, but they were declined. (R. 484-485.)

Examination of the portions of the Record referred to by appellant indicate that the requests for the work-sheets were for their examination outside the sessions of Court, or that they be placed in evidence as Government exhibits. The Government refused to accede to the latter request, as the thousands of items involved would have but further encumbered the record, and they were nothing but recapitulations of matters already in evidence.

In his argument, counsel for appellant states (Op. Br. 38):

> This is a trial where an agent testifies that he has investigated the defendant and finds her guilty.

No such testimony is in the record.

II.

THE EVIDENCE IS MORE THAN AMPLE TO SUPPORT THE VERDICT.

In her Opening Brief, pages 4 to 24, appellant argues principally to the contention that the evidence was insufficient to support the verdict. A short statement of the evidence set out at the opening of this brief under the heading Statement of Facts clearly indicates that the evidence was more than sufficient to justify the verdict.

The evidence clearly shows that the appellant understated her income for each year in question. As to wilfulness and the intent to evade tax, it was shown that she made false entries in her books understating her true income, and made false entries relative to charitable donations. The false records were supplied by her to the witness Bosserman from which to prepare her returns. During the investigation she made false statements concerning her true income and as to the authenticity of certain of her records. It was not necessary for the Government to prove the exact amounts of unreported income as alleged in the indictment, nor to offer direct proof of wilfulness and intent. *Maxfield v. United States, supra.*

III.

NO PREJUDICIAL ERRORS OCCURRED BY REASON OF THE ADMISSION OR EXCLUSION OF EVIDENCE AND THE APPELLANT WAS ACCORDED A FAIR TRIAL.

In her Opening Brief, pages 51 to 57, appellant complains of rulings of the court by which it is claimed that much admissible evidence was excluded. Throughout the brief, appellant claims that she was not afforded a fair trial.

(A) ADMISSION AND EXCLUSIONS OF EVIDENCE.

Most of the objections to the exclusion of evidence fall of their own weight, as the evidence was clearly inadmissible, and in any event its exclusion would not constitute prejudicial error.

(1) At pages 51 and 55 to 57, Appellant's Opening Brief, she complains as to the Court's rulings with respect to a community property issue sought to be injected into the case by her. The evidence showed that appellant and one William Jost were married in March, 1942, separated on July 8, 1943, that appellant received an interlocutory decree of divorce on July 22, 1943 (R. 230-231) and a final decree of divorce one year later (R. 116-117). The complaint in the divorce proceeding, to which the default of Jost was entered, recited, over the verification of appellant, that there was no community property the result of the marriage and that all the property of the appellant was her separate property. (R. 113-115.) The interlocutory and final decrees were silent as to community property. (R. 113-115.)

The courts of California have determined that in such a state of the pleadings, the final decree of divorce, although silent as to property, nevertheless operates as an adjudication that at the time the action was begun there was no community property. *Brown v. Brown,* 170 Cal. 1, 174 Pac. 1168; *Lorraine v. Lorraine,* 8 Cal. App. (2d) 887, 48 Pac. (2d) 48.

The evidence shows that at all times the appellant exercised complete management and direction of the tavern, and that the husband received no part of the income or assets of the business, either during or after marriage. (R. 231-232.) The money to purchase the one-half interest in the business from Divers was borrowed by appellant under the name of Catherine Larson, and on her own credit. (R. 107-108.) The bank accounts were also carried in the name of Catherine Larson. (R. 104-105, Ex. 8), (R. 110-111, Ex. 10.)

The conviction which is here appealed relates only to the calendar year 1942. For that year, appellant and her then husband chose to file a joint return (Ex. 2), purporting to return all of the taxable income of both spouses, from whatever source. Each is therefore liable for any deficiency from his or her separate income. *Cole v. Commissioner,* 81 F. 2d 485.

(2) Appellant asserts (Op. Br. 51-52) that she was precluded from impeaching the veracity of a bartender formerly employed by her by inquiring into the number and amount of drinks of liquor he had each day. *The question was permitted by the Court,*

was answered by the witness, and the subject explored in detail. (R. 274-275.)

(3) Appellant asserts (Op. Br. 52-53) that the cross-examination of the witness Shannon as to opening amounts in the cash register each day was not permitted. The record is contrary to such assertion, as the questions asked by appellant's counsel, with the exception of one which assumed a fact not in evidence, were permitted to be asked and answered by the witness. (R. 271-272.)

(4) Appellant objects to the Court having sustained objections to certain questions asked the witness Bosserman during cross-examination on the grounds that if the answers were permitted, they would have impeached this witness. (Op. Br. 53-55.) Examination of the Record, pages 318 to 328, discloses that as to many of these questions, counsel did not lay the proper foundation as to impeachment, and as to others that he mislead the witness as to contents of the record on the first trial.

(5) Appellant asserts (Op. Br. 59) misconduct on the part of Government counsel for interposing an objection to a question during the cross-examination of the witness Washauer on the ground that the question was argumentative and misstated the record (R. 101-102). Appellant's attorney stated that the objection was an attempt by Government counsel "to get his witness out of a difficult position." (R. 102.) It was this latter statement that the Court referred to as "unwarranted" and ordered the jury to disregard it,

on objection of the Government. It is submitted that counsel's characterization of Government's objection was gratuitous and uncalled for. However, the Court's statement cannot be properly termed a reprimand or, if so, it cannot be considered uncalled for.

(B) APPELLANT WAS ACCORDED A FAIR TRIAL.

Throughout their brief, and consuming a large portion of it, counsel for appellant have seen fit to launch a bitter, vituperative, at times scurrilous and at all times wholly unwarranted attack upon the motives, honesty and character of practically everyone having any connection with the trial. These include the agents who made the investigation, the officials of the Bureau of Internal Revenue who reviewed the evidence, those of the Department of Justice who approved it for prosecution, the Grand Jury which returned the indictment, the officials of the Government who presented the case to the trial jury, and finally even the Trial Judge. Counsel have referred to the trial as being one by "denunciation", a term, incidentally, which they employ some twenty-one times in their brief. (Op. Br. 19-39.) The term "denunciation" is an apt description of Appellant's Opening Brief.

Counsel assert (Op. Br. 13-14) that it was improper for the Trial Judge to rule that a motion for dismissal upon the grounds of insufficiency of the evidence should be made in the presence of the jury. It has long been settled in this Circuit that this is a matter wholly in the discretion of the judge. *Ng Sing v.*

United States, 8 F. 2d 919, 920. In excusing their failure to renew the motion before the jury, counsel assert they considered their "very low percent of success . . . on motions and ruling . . . upon matters that appeared meritorious." They likened the manner of the Court in his rulings to that of a "drill sergeant to a recruit" and other rulings "spoken with inflection implied defense counsel had no valid point and was 'bamboozling' the court." Therefore, they concluded, that if the Court ruled on the motion to dismiss, it "might well be said with such inflections and intonations of the Court as to amount to a directed verdict to convict."

Again, counsel state the Trial Judge threatened them with contempt. (Op. Br. 16-17.) Examination of the record discloses that no such threat was made.

The Judge, after sustaining objections to a certain line of questions, ordered counsel to desist from further questions of the same nature. When counsel failed to do so, the Court warned him to obey the order of the Court. The questions in issue were in an attempt to impeach his own witness, and objection was properly sustained. (R. 605-608.)

A further direct attack is made upon the Trial Judge on pages 24-25, Appellant's Opening Brief. There he is charged with sustaining Government objections "no matter how weak or illfounded." By inference, at least, the Judge is accused of being a party to a "trial by denunciation," and making "due process, the requirement of an indictment by a grand

jury, etc. . . . but empty phrases in the Constitution." (Cf. App. Op. Br. 38-39.)

The eminent fairness, judicial attainments, and universal courtesy to all parties appearing before him of the District Judge thus unfairly attacked is too well known to the Bench and Bar to dignify such charges by answer. Suffice it to say that the assertions of counsel for appellant can be supported *neither on nor off the record*. Counsel for the Government feel, however, that these and similar absolutely unsupported attacks upon the Court and our judicial system, by members of the Bar of this Honorable Court should be called to its attention. For support, counsel for appellant do not even attempt to cite the record in the majority of instances.

IV.

NO ERROR OCCURRED IN THE INSTRUCTIONS GIVEN BY THE COURT TO THE JURY, OR IN THE REJECTION OF ANY OF APPELLANT'S PROPOSED INSTRUCTIONS.

Appellant complains that the Court committed error in refusing numerous instructions to the jury requested by her, and that certain of the instructions given by the Court constituted reversible error. (Op. Br. 60-80.) These matters will be treated in the same order as referred to in the Opening Brief.

(1) Appellant's proposed instructions 1, 2, and 3 (R. 46-47) are predicated on the theory that rents from real property are not income to the mortgagor-

owner of the property if the rents have been assigned to the mortgagee to be applied against the purchase price of the property in California where a deficiency judgment cannot be obtained upon default of a purchase-money obligation. This is not a correct statement of the law.

This Court has held that where the holder of a leasehold interest merely assigns rentals without assigning lease itself, assigned rentals were property taxed as income of assignor. *Ward v. Commissioner,* 58 F. 2d 757. The case of *Hilpert v. Commissioner,* 151 F. 2d 929, relied upon by appellant (Op. Br. 60-61) has no pertinency. There, the question involved whether or not certain rents were taxable to one person, when in fact they accrued entirely to the benefit of another, and when the first person had made a purported sale of the property and reported the gain realized thereby. In the instant case, the net rentals accrued entirely to the taxpayer by way of increasing her equity in the property, and, ultimately (and in the period here in question) resulting in her obtaining clear title to it.

(2) Appellant complains (Op. Br. 61) that the Court did not give an instruction with regard to expert testimony in the language of the statute (28 U.S.C. 638) as in proposed instruction No. 4 (R. 47). The instruction given, however (R. 934), was full and complete. All of the documents in question, together with the admitted or proven handwriting, was before the jury in the course of the trial and in their deliber-

ations. They were instructed that they were not bound to accept the opinions of the experts.[2]

(3) Proposed Instruction Number 5 (R. 47-48), discussed by appellant (Op. Br. 61) is not a correct statement of the law in that it implies that appellant was under no obligation to report inventory changes on her income tax returns.

Whatever the system of accounting used by a taxpayer, inventory changes must be reported "whenever, in the opinion of the Commissioner, the use of inventories is necessary in order clearly to determine the income of any taxpayer. . . ." *Internal Revenue Code Section 22(d)(1).* By *Regulations 111, Sec. 29.22(c)-1,* the Commissioner requires that inventory change must be reported "in every case in which the production, purchase, or sale of merchandise is an income-producing factor."

(4) Appellant's Proposed Instruction No. 6 (R. 48) was fully covered in the Court's instructions (R. 919-921) wherein full and complete instructions were given as to the meanings of gross and net income, deductible business expenses, etc. Despite appellant's assertion to the contrary (Op. Br. 61), the law with relation to burden of proof was covered by the Court (R. 927-8).

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[2]A typographical error appears in the Court's instructions at line 21, page 934, of the Record on Appeal. The sentence as given by the Court commenced: "You are *not* bound to accept the opinion of an expert as conclusive. . . ." (Emphasis supplied.)

(5) Proposed instructions 7, 8 and 9 (R. 49-50) are fully covered by the Court in his instruction, so far as pertinent (R. 918-919, 924, 925, 926).

(6) Appellant's Proposed Instructions Nos. 10, 11, 12, and 13 (R. 50-52) deal with the liability of a principal for the acts of his agent. It has no application to the instant case. The only matters with relation to appellant's business which were not performed personally by her, was the placing of the figures in the returns by the accountant Bosserman. His testimony was that the partnership return (Exh. 1), covering the period January 1 to July 15, 1942, was prepared from the "gray book" (Exh. 14), and that the balance of the returns (Exhs. 2, 3, 4) were prepared from Exhibit 5, with the exception of rental income for 1944, which was supplied by appellant (R. 278-283). No other records were supplied to him. (R. 281.) He relied upon the receipts as set forth in Exhibit 5 as being accurate. (R. 283.) His employment was only to prepare the returns, and no audit was made by him. (R. 278.) Under this state of the record, the Court properly instructed the jury relative to her reliance on the accountant. (R. 926.)

(7) Proposed Instructions Nos. 14, 32, 33, and 34 (R. 52, 58-59) are not applicable to the present charge. The appellant was not charged with wilful failure to file (indeed, the evidence showed returns filed for each year), nor with wilful failure to pay. The Court instructed clearly as to the nature of the charge, the elements which the Government must prove to sustain the charge, and, finally, that the jury should disre-

gard any other offense which the evidence might indicate. (R. 928.) The proposed instructions would have served but to confuse the jury as to the real issues.

(8) Appellant offered a number of instructions relative to community property which are referred to in Appellant's Opening Brief, pages 64 to 67. The matter of community property rights have heretofore been treated in this brief. The evidence clearly shows that the omitted income was that of the wife. The false return, resulting in the understatement and attempted evasion of a substantial amount of the tax owed on the joint incomes of the husband and wife were caused entirely by her acts, and not through any acts of the husband. The proposed instructions were properly rejected.

(9) Appellant's Proposed Instructions Nos. 52 and 53 (R. 68-69) are clearly not applicable. *The Current Tax Payment Act of 1943,* Public No. 68-78th Congress, H.R. 2570, in Section 6(a), relative to forgiveness of 1942 income taxes under certain situations, makes the following proviso:

> . . . This subsection shall not apply in any case in which the taxpayer is convicted of any criminal offense with respect to the tax for the taxable year 1942 or in which additional tax for such taxable year are applicable by reason of fraud.

Obviously, if the jury found from the evidence that appellant attempted wilfully to evade and defeat a substantial part of her 1942 tax liability by filing a false return for that year, the Current Tax Payment

Act would have no application. The Court so instructed the jury. (R. 927.)

(10) Appellant offered proposed instructions Nos. 57, 58, and 59 (R. 71-72) attempting to raise a presumption that criminal acts performed by a wife in the presence of her husband are presumed to be at the coercion of the husband. (Op. Br. 74-75). While such a legal fiction existed at common law, it is no longer valid in the light of modern day conditions, where the participation of women in the business world on an equal basis with men, requires that they assume their full responsibility in regard to criminal acts, in the absence of a positive showing that such acts were due to the coercion of the husband. This view is expressed in *Conyer v. United States,* 80 F. 2d 292, 294 (C.C.A. 6th) wherein the Court states:

> The modern statutes dealing with the status of women have modified the common-law rule that a woman violating a statute in the presence of her husband is presumed to be acting under his coercion. The independence of women in political, social, and economic matters rightly places upon them an increased responsibility. We find no reversible error in the refusal of the Court to charge as requested upon this point.

The evidence in this case has shown that appellant was the active moving party in the offense committed; indeed, that her husband did not participate in any manner. The Court did not err in failing to give the proposed instructions. Cf. *Dawson v. United States,* 10 F. 2d 106 (C.C.A. 9th) certiorari denied, 46 S.Ct. 638, 271 U.S. 687.

(11) The balance of the instructions requested by appellant and refused by the Court were either without application, or were fully and adequately covered by the instructions given.

(12) Appellant has found fault with certain of the instructions given by the Court. (Op. Br. 75-80.) However, no exceptions were taken by appellant to the charge as given by the Court. *Rule 30, Federal Rules of Criminal Procedure,* provides in part:

> . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. . . .

Clearly, appellant can not raise the issue for the first time at this point.

In their argument with respect to the instructions as given, counsel for appellant have misquoted or misconstrued many of the instructions given, without calling the attention of this Honorable Court to where in the Record on Appeal the alleged improper instructions occur, or giving effect to the instructions as a whole. Only by reading instructions as a whole can it be seen how one instruction is enlarged, modified, or explained by another.

Counsel frequently accuse the Court of giving "formula" instructions on various matters. We confess we are unable to understand this term as applied to instructions, nor the implication of counsel in using it.

For example, counsel state (Op. Br. 75) that the Court gave a formula instruction amounting to a direction to the jury to disregard community property. It is presumed that counsel are referring to the instruction appearing at pages 922 and 923 of the Record on Appeal. The instruction was merely to the effect that if the jury chose to believe certain of the evidence offered by the Government it could arrive at certain conclusions therefrom. There is no direction to the jury that they must do so.

Counsel refer to purchase of a half interest (presumably in the tavern) on the credit of the community. (Op. Br. 75.) Nowhere in the record is there evidence that the credit of the community was so utilized. On the contrary, the evidence showed that the money to purchase the half-interest from Divers was secured from the Morris Plan Company, from whom appellant had borrowed money prior to her marriage to Jost, and was borrowed under the name of Catherine Larson. (R. 107-108.) Nowhere does the name of Jost appear in the transaction.

The Court's instructions on what acts would constitute a violation of the statute were taken directly from *Spies v. United States,* 317 U.S. 492, 63 S. Ct. 364; those relative to wilfullness from *United States v. Murdock,* 290 U.S. 389, 54 S. Ct. 223. Both are recognized as the leading cases on their subject matter.

CONCLUSION.

It is respectfully submitted that appellant was not prejudiced by any of the rulings of the Trial Court or by its instructions given or refused. A reading of the entire record and of the exhibits submitted conclusively demonstrate her guilt. She was given a trial which was eminently fair in every respect. The sentence and judgment of the Court are in exact conformance. (R. 38-41.) Cf. *Hill v. United States*, 298 U.S. 460, 56 S. Ct. 760.

The conviction should be affirmed.

Dated, January 31, 1949.

Respectfully submitted,

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